

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV//T/53/15**

**In the Matter Between:-**

**SHABE TSELA**

**1<sup>st</sup> PLAINTIFF**

**MOLEFI THATO**

**2<sup>ND</sup> PLAINTIFF**

**PHEELLO SEHLABAKA**

**3<sup>RD</sup> PLAINTIFF**

**MATSITA ROSE T'SITA**

**4<sup>TH</sup> PLAINTIFF**

**'MASUPING MOT'SOARI**

**5<sup>TH</sup> PLAINTIFF**

**REFILOE KOLOBE**

**6<sup>TH</sup> PLAINTIFF**

**NTHABISENG MATSOSO**

**7<sup>TH</sup> PLAINTIFF**

**PABALLO TILO**

**8<sup>TH</sup> PLAINTIFF**

**'MAKENEUOE MOKHORO**

**9<sup>TH</sup> PLAINTIFF**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF JUSTICE**

**1<sup>ST</sup> DEFENDANT**

**MINISTRY OF PUBLIC SERVICE**

**2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> DEFENDANT**

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**JUDGMENT**

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**CORAM** : **MOKHESI J**  
**DATES OF HEARING** : **03<sup>RD</sup>.10.2019 and 05<sup>th</sup>.12.2019**  
**DATE OF JUDGMENT** : **05<sup>th</sup> MARCH 2020**

**CASE SUMMARY:** *Employment Law: An action for equal pay for performing the same work – Pay differentiation being challenged on the basis violation of the provisions section 18 of the Constitution – Meaning of “Other Status” as it appears under section 18 of the Constitution deciphered – what a claimant under a claim for equal pay for performing the same work must prove –*

*Mandamus – Plaintiffs requesting the court to order the defendants to fill non-existent position – requisites of mandamus Re-stated.*

## **ANNOTATIONS:**

**BOOKS:** *John Grogan, Workplace Law 12<sup>th</sup> Ed.*

*Yvonne Burns, Margaret Beukes, Administrative Law under the 1996 Constitution 3<sup>rd</sup> Ed.*

**STATUTES:** *1993 Constitution of Lesotho*

**CASES:** *Principal Secretary, Ministry of Tourism, Environment and Culture and Others v Selloane Makha and Others C of A (CIV) No. 35/2012 [2013] LSCA*

*Mangena and Others v Fila South Africa (PTY) Ltd and Others [2009] 12 BLLR 1224 (LC)*

*Timothy Thahane and Others v Specified Officers Defined Contribution Pension Fund C of A (CIV) No. 4/2016*

*Moshoeshoe Molapo v Principal Secretary Ministry of Communication and Technology and Others CIV/APN/105/2019 (unreported) (dated 12/12/2019)*

*Cardon v United Kingdom, Application NO. 42184/05 [2010] ECHR 338*

*R v (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63: [2009] 1 AC 311*

*Mthembu and Others v Claude Neon Lights (1992) 13 ILJ 422(IC)*

*Sentrachem Ltd v John NO and Others (1989) 10 ILJ 249 (WLD)*

*National Union of Mineworkers v Henry Gould (Pty) Ltd and Another (1988) 9 ILJ 1149*

*Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others (JR1501/17 [2019] ZALCJHB31)*

## **PER MOKHESI J**

**[1]** The plaintiffs in this matter had instituted an action against the defendants seeking the following relief:

- a) The proper position held by the Interpreters in the High Court of Lesotho is that of Principal Interpreters.
- b) That it is hereby declared that the proper salary scale on which the interpreters of the High Court of Lesotho should be paid at is grade I
- c) In the alternative, the interpreters of the High Court of Lesotho should not be paid salary below grade G in the further alternative not below F
- d) That it is hereby declared that the Interpreters High Court of Lesotho have been continuously underpaid from 2005 to the date of finalization of these proceedings and alternatively, the dependents are ordered to pay the plaintiffs' underpayments from January 2013 to date of the judgment.
- e) That the defendants be ordered to fill in the position of the Chief Interpreter that remains vacant.
- f) That the defendants be ordered to pay costs of suit.

This action is defended.

### **[2] Factual Background.**

The plaintiffs are Principal Interpreters of this court and Court of Appeal engaged at varying times since 1977 to 2012. All but three Interpreters have academic degrees in various fields such as Human Resource etc. But even those who do not possess any academic degrees, have amassed a considerable experience as Interpreters. When the plaintiffs were first engaged as Interpreters they were

required to have a Diploma in Education or C.O.S.C certificate plus experience of 3 years as an interpreter and/ or Senior Clerk of Court. As Principal Interpreters they are paid at salary scale grade E.

[3] One of their colleague one Charles Mantsoe Makhoathi was first engaged in 1997 as a Senior Interpreter based at the Magistrates' Court, already in possession of a Bachelor of Education Degree, at grade E. He was subsequently upgraded to Grade F, effective from 01<sup>st</sup> April 2000 pursuant to a Savingram addressed to all Ministries (Public Service Circular Notice No. 8 of 2000, dated 18<sup>th</sup> April 2000). The effect of this Savingram was to upgrade the graduates' entry point to Grade F. Mr Mantsoe earned a salary at Grade F while he occupied the position of a Senior Interpreter.

[4] The other colleague of the plaintiffs, one Masilo Maphalla was engaged as Principal Interpreter on the 30<sup>th</sup> June 2008. While engaged as such he furthered his studies and obtained a Bachelor of Arts in Language Practice, and on completion, was promoted to the rank of Assistant Interpreter, salary grade F tenable at the High Court, on 09<sup>th</sup> November 2018. This designation was changed to that of Assistant Interpreter in June 2016. This change in the designation was effected subsequent to a Savingram which was issued by Principal Secretary, Ministry of Public Service addressed to PS Labour and Employment, Registrar of the High Court, and Clerk of the National Assembly, dated 06 June 2016.

[5] In terms of the said Savingram P.S Moreke (PS Public Service, as he then was) wrote: (in relevant parts)

**"RE: VARIATION IN THE ESTABLISHMENT**

Ministry of the Public Service realized that there is anomaly in naming and grading of Interpreter/D, Interpreter/E Principal Interpreter/E and Senior Interpreter positions in different Ministries. Following thorough assessment of the job descriptions of the above mentioned positions, your good offices are notified that the positions be designated as follows:

Head	Cost	REF	Job Title/Grade	EST	
16	04	10	Assistant Interpreter/F	1	Redesignate one position Interpreter/F at Centre 01, Ref. 6
38	01	19	Hansard Editor	4	Redesignate four(4) positions of Interpreters/ G at Cost Centre 01, Ref. 19
45	01	16	Interpreter Assistant/E	1	Redesignate one position of Principal Interpreter/E at Cost Centre 01, ref. 16
45	01	49	Interpreter Assistant/E	1	Redesignate one position of Senior Interpreter/E at Cost Centre 01, Ref. 49

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**[6] Respective Parties' Cases.**

Although this case was initiated by way of action, its facts are largely common cause. The plaintiffs' case rests on at least three grounds, namely:

- a) Pay discrimination: There are two facets to this claim; (i) the plaintiffs claim that they are being discriminated against Interpreters at the National Assembly who are paid higher than them; (ii) that they are being discriminated against in relation to Assistant Interpreters who are paid at Grade F
- b) Mandamus: That the defendants be ordered to fill the position of the "Chief Interpreter that remains vacant".
- c) A declarator that they have been continuously underpaid from 2005, and that the defendants should be paid arrear underpayments from 2013 to date.

**[7]** On the other hand the defendant deny that the plaintiffs have been discriminated against. They argue further that mandamus is an inappropriate order to ask from this court as the position of 'Chief Interpreter' is non-existent; the essence of this argument is that the courts do not have power to order creation of new positions as this power does not reside in them. I turn to deal with the issues raised, but not in the order in which they appear above:

**[9] (i) Mandamus:**

It is the plaintiffs' case that this Court should order the defendants to fill the position of Chief Interpreter which they allege exist and is not being filled. It is an undeniable fact that this position does not exist in the Judiciary establishment list, and so, for the plaintiffs to ask that the defendants be ordered to fill it is a bit baffling. The remedy of mandamus is appropriate where the administrator is compelled to perform his statutory duty. There is no duty on the Public Service to create positions where such is not requested by the relevant ministry, in this case, the Judiciary. This procedure for creating positions is indisputable. It is trite that "[a] mandamus may only be granted in circumstances where the public official has a clear duty to perform the action ordered. In other words, the judicial officer may only order the administrator to perform a duty which falls clearly within the ambit of the enabling statute. For example where a statute confers discretionary power a public official, the judicial officer can compel the functionary to exercise its discretion but not determine the manner in which the discretion should be exercised." (Yvonne Burns, Margaret Beukes *Administrative Law under the 1996 Constitution 3<sup>rd</sup> Ed. At p. 525*). In *casu*, the plaintiffs are not alleging that the defendants have a duty placed on them in terms of the statute, to create the said position, as to entitle this court to order them to act in terms of such a statutory command. This prayer, therefore, falls to be rejected.

## **[10] (ii) Pay Discrimination against the Plaintiffs**

### **(a) Are the plaintiffs being discriminated against *vis-a-viz* Interpreters at the National Assembly?**

In addressing the question whether the plaintiffs have been discriminated against, resort must be had to the provisions of section 18 of the **Constitution**. In relevant parts, it provides:

"18(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection 6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public authority.



(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or ***other status*** whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

.....”(emphasis added)

Because the plaintiffs are not impugning the provisions of the law as being discriminatory, but are rather suing based on the violation of section 18(2) of the Constitution. Further, because the plaintiffs are not alleging that they are being discriminated against on the basis of the proscribed enumerated grounds appearing under section 18, their action is based on being disadvantaged on the basis of “***other status***” (I deal with this concept below); they allege that they are interpreters who are similarly circumstanced as Interpreters at the National Assembly and Assistant Interpreters, but they are paid less.

#### [11] “Other Status”:

Under section 18 of the **Constitution** ‘Status’ is not a prohibited ground of discrimination. This was made clear in ***Timothy Thahane and Others v Specified Offices Defined Construction Pension Fund C of A (CIV) NO. 4/2016*** at para. 22:

“...Status itself is not a prohibited ground of discrimination and that in the context, ‘or other status’ means an attribute related to status that is equivalent or analogous to, but not the same as the specific grounds mentioned. These might, for example, be marital status or sexual orientation.”

In ***Moshoeshe Molapo v PS Ministry of Communications and Technology and Others (CIV/APN/105/2019 (unreported) dated 12/12/2019*** at para. 13. I alluded to the fact that section 18 is couched similarly as Article 14 of the ***European***

***Convention for the Protection of Human Rights and Fundamental Freedoms of 1950***; and that the interpretative jurisprudence developed by European Court of Justice around this Article, is highly persuasive to this court.

[12] I am adverting to Article 14 because the explanation by the Apex Court in ***Thahane***, of what constitutes ‘*other status*’, at first blush, might give an impression that the concept was or should be so restrictively interpreted. I think the court was merely giving an example of ‘*other status*’ rather than espousing a restrictive interpretation of same.

[13] Given what I said above, that section 18 is modelled on the Article 14, the purview of the phrase “Other Status” as it emerges from the interpretative process of the European Court Of Justice (ECJ) would seem to encompass almost any distinction, but of course with the qualification that the distinction or differentiation must be based on “personal characteristics” (***Carson v United Kingdom, Application No. 42184/05 [2010] ECHR 338 at para. 61.***

“61. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14 (citation omitted). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (citations omitted). Such a difference in treatment is discriminatory if it has no objective and reasonable justification.....”

[14] A wider conception of “personal characteristics” is therefore enjoined. Lord Walker, in ***R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63; [2009] 1 AC 311*** at para. 5 provided meaningful illustration as to what amounts to “Status” or “personal characteristics” which should justify review under Article 14, said the following;

“‘Personal characteristics’ is not a precise expression and to my mind a binary approach to its meaning is unhelpful. ‘Personal characteristics’ are like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality; gender, sexual orientation, pigmentation of skin,

hair and eyes, religion and politics may be almost innate (depending on person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts), but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, or with what happens to them, than with who they are; but they still come within Article 14 (Lord Neuberger Instances Military Status, residence or domicile, and past employment in the KGB). Like him, I would include homeless as falling within that range, whether or not it is regarded as a matter of choice... The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive where discrimination is particularly difficult to justify...."

[15] As a general principle, people doing the same work must be paid equally. However the employer has a right to pay its employees different wages depending on their length of service, qualifications, skills level, efficiency, seniority, responsibility, productivity and market forces; (see; on *seniority*, ***National Mineworkers v Henry Gould (Pty) Ltd and Another (9188) 9 ILJ 1149***; *length of service, qualifications and skill*, ***Sentrachem Ltd v John N.O and Others (1989) 10 ILJ 249 (WLD)***; *productivity*, ***Mthembu and Others v Claude Neon Lights (1992) 13 ILJ 422 (IC)***; *market forces*, ***Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others (JR1501/17) [2019] ZALCJHB 31***). The basis of differentiation in salaries between employees doing the same work must be rational and objective, in other words there must be a proportional relationship between the means employed and the aim sought to be achieved by paying employees differently for doing the same work (*John Grogan, Workplace Law 12<sup>th</sup> Ed. At p. 109*). The peculiarity of every case must be carefully analyzed to determine whether reasonable proportionality exists between the means employed and the aim sought to be achieved.

**[16]** In claims for equal pay for equal work, the plaintiffs/applicant must identify a comparator, and secondly, establish that the work done by the plaintiff is more or less similar or the same as that of the comparator. Once this has been done, the applicant must establish a link between the differentiation, that is difference in remuneration for same work and the specified prohibited grounds under section 18(3) of the Constitution or on reasons attributable to the *other status* whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description (***Mangena and Others v Fila South Africa (PTY) Ltd and Others [2009] 12 BLLR 1224 (LC)*** at para. 6. Once the link is established the onus shifts to the employer to show that there are rational and objective reasons for pay differentiation (**Grogan** supra at p. 109).

**[17]** Upon a careful perusal of evidence I could not find anywhere where the plaintiffs are providing evidence of a comparison between themselves and the Interpreters at Parliament. In my considered view, the plaintiffs may have had an exaggerated view of their importance; for example the highest qualification for interpreters at Parliament is a Master's Degree in Linguistics, while the Principal Interpreters were required to have a Diploma in Education or C.O.S.C. with some experience. The fact that the plaintiffs share the same position designation of 'Interpreter' with Interpreters at Parliament does not mean that they are similarly circumstanced, nomenclature alone cannot provide a decisive pointer of similarity between the National Assembly Interpreters and the plaintiffs. The plaintiffs failed to provide evidence of the basis of comparison other than similarity in nomenclature. I therefore, find that plaintiffs are not discriminated against in relation to interpreters at the National Assembly.

**[18] (b) Are the plaintiffs being discriminated against in relation to Assistant Interpreters?**

The plaintiffs are claiming that Assistant Interpreters earn more than them when in actual fact they do the same job. It is the defendants' contention that the plaintiffs are not suffering any discrimination as they allege, as the Assistant

Interpreters are placed at Grade F because they are Degree-holders per Public Service Circular no.8 of 2000. The requirement that entry point for degree holders be at Grade F was introduced in the year 2000 by means of the said Public Service Circular Notice NO. 8 of 2000, the purport of which was aptly captured in the *Principal Secretary – Ministry of Tourism, Environmental and Culture and Others v Selloane Makha and Others (C of A (CIV) NO. 35/2012) [2013] LSCA 5* at para. 19, where Howie JA (as he then was) said:

“[19] Several aspects of the circular are significant. First, it is about the regarding of posts, not about increasing remuneration irrespective of one’s post. Second, the main focus is on raising the grade at which new officers who have degrees enter the service. Obviously, they will only be able to enter if grade F posts are available and they are appointed to them. Third, the only future officers who are referred to are officers with degrees who join the service on or after 1 April 2000. All other officers mentioned are people already in the service as of 31 March 2000. In particular, serving degree graduate officers are those with degrees who are already in the service on that date. Fourth, non-degree holders are specially mentioned. The first and third respondents were in that category on 31 March 2000. The circular does not provide for the re-grade of their posts. Still less does it provides that then non-degree holders who later acquire degrees will be entitled either to a re-graded grade F post or to increased remuneration on the grade F level.”

[19] Regarding non-degree holders the Circular provided that:

“.....

2. In most cases jobs at Grade F and below will have to be merged and re-designated accordingly. Non-degree holders who are at Grade E will retain the current grade and designations until ministries have reviewed their structures.”

[20] The above is a framework against which the plaintiffs’ case must be viewed and determined.

### **Discrimination Justification**

The employer, in *casu*, acknowledges that there is a pay disparity between the Principal Interpreters and Assistant Interpreters. It however says the disparity in pay is due to difference in educational qualifications between the plaintiffs and the two Assistant Interpreters as the latter possess relevant Degree qualifications, and that in terms of Circular No.8 of 2000 they have to earn a salary at Grade F. What has to be determined is whether the employer's justification for this pay differentiation is rational and objective. This is the proportionality test: This test seeks to determine whether there is reasonable relationship between the means used for pay distinction between the Principal Interpreters and Assistant Interpreters, (in this case a distinction based on academic qualifications) and the aim sought to be achieved, of paying relevant Degree holders at Grade F. Perhaps at the risk of being repetitious, it needs to be recalled that the Government introduced pay disparities for degree and non-degrees holders in the Civil Service by means of Public Service Circular Notice No. 8 of 2000 alluded to earlier in the judgment. The aim of the said Circular being to provide for the following;

- a) Re-grading of posts
- b) Raising grade at which degree holders who are new entrants into the Civil Service are to be placed.
- c) The entry point of new entrants who are degree-holders
- d) The circular provided that non-degree holders who are already in the Public Service will have to retain Grade E "until Ministries have reviewed their structures."

**[21]** It needs to be mentioned that the two Assistant Interpreters possess a Degree in Education and Bachelor of Arts in Language Practice respectively while some of the plaintiffs have an assortment of Degrees not similar to the one possessed by the two individuals. Other plaintiffs do not have degrees at all. Academic job requirement for Principal Interpreter position is a Diploma in Education

(Languages) or C.O.S.C with pass in Sesotho and English plus three years' experience as an Interpreter and/or Senior Clerk of Court.

**[22]** On the other hand, Assistant Interpreters are required to have Bachelor's Degree in Translation/Interpretation or related field. The duties are the same as those of Principal Interpreters, apart from the fact they are required to supervise Interpreter Assistants, positions which are non-existent on the Judiciary establishment list.

**[23]** (i) The main duties of the Principal Interpreter are:

- a) Interpreting during court and court – related proceedings in the High Court and Court of Appeal.
  
- b) Interpreting both official languages
  
- c) Translating records and correspondences
  
- d) Assisting in the preparation of sitting of the court of Appeal.

(ii) The level of skill and knowledge required for Principal Interpreters are: knowledge and experience of basic law; interpersonal skills and communication skills. On the one hand Assistant Interpreters are required to have; extensive knowledge and experience in interpretation or translation; good communication skills; encyclopedic knowledge; ability to work under pressure; research skills.

**[24]** Straight from the starting blocks, my opinion is that pay differentiation between the plaintiffs and Messrs Maphalla and Mantsoe, is not rational and objective, for the following reasons; A dispassionate look at the duties of Assistant Interpreters and Principal Interpreter makes it plain that they perform the same duties in all material respects. The level of skill, efficiency, responsibility and productivity required for both positions are the same. It needs to be mentioned

that when all Principal Interpreters and Senior Interpreters were first engaged, academic job requirement was not a Degree. When Circular no.8 of 2000 was introduced, Mr Mantsoe, despite him being a Senior Interpreter was automatically paid at Grade F when as I have said the job did not require him to have a Degree. He was merely upgraded because he happened to have a higher qualification than the one required for the job. In 2016, the Public Service faced with an anomalous situation where a Degree holder in the same cadre earns more than his colleagues despite the fact that the position did not require the incumbent to have a Degree, and given that the same person did the same work as those colleagues, the authorities designated the position of Assistant Interpreter, with responsibilities still being the same. The designated position of Assistant Interpreter now requires a Degree in Translation/Interpretation or related field.

**[25]** It will be observed that when Mr Mantsoe was paid at Grade F in the year 2000 there were people who were already there with vast experience and with the same skills set and responsibilities as himself. Further on in the year 2018, Mr Maphalla, subsequent to him acquiring a Degree in Language Practice, was promoted to the position of Assistant Interpreter. Given that the only reason for pay disparity between the plaintiffs and their two colleagues is superior relevant qualifications, I find that the defendants are giving this factor an undue weight, ignoring glaring facts such as the ones highlighted above, *viz*, that the plaintiffs and Assistant Interpreters' work requires the same mental and emotional preparedness, quantity and quality of delivery. It follows, therefore, that in the peculiar circumstances of this case, pay distinction based solely on academic qualifications as a trump over the objective circumstances which militate against such approach, is not rational and objective.

**[26]** Given that the defendants pinned their colours to the mast of Circular no.8 of 2000 for pay disparity in this case, in my view, the aim of this Circular as stated above was not to exclude non-degree holders from earning at Grade F even where peculiarities of the cadre do not admit of such an exclusion. To argue that the one of the aims of the circular is to exclude non-degree-holders from being paid



similarly as degree-holders at Grade F, regardless of the peculiarity of the situation cannot be a correct. The Circular says what it says, but when it comes implementing pay structure, the employers must eschew a regimented approach like the one the defendants are adopting in relation to the defendants, but, must instead carefully analyze every situation to avoid falling foul of proscription against discrimination.

### **[26] Back-Payments**

It is the plaintiffs' prayer that in the event that this Court finds that the plaintiffs have been underpaid, the said underpayments should be reckoned from the year 2013. I have no doubt that the plaintiffs' underpayments should be calculated from 1<sup>st</sup> January 2013.

### **[27] Structural Issues**

I have observed that there is serious structural problem as regards Interpreter cadre, for the following reason: It is not clear whether Assistant Interpreters are senior to the Principal Interpreters, even if they are by virtue of being paid at a higher grade, it does not make sense that they are assistants to non-existent position, as currently, on the establishment list, there is no position above them. This structural problem should be attended to and resolved to avoid any confusion.

**[28]** In the result the following order is made:

- a) It is declared that Principal Interpreters of the High Court of Lesotho should be paid at salary grade F.
- b) It is ordered that the defendants should pay the plaintiffs' underpayments from 1<sup>st</sup> January 2013 to date.
- c) That the defendants should pay the costs of suit.

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MOKHESI J

**FOR THE PLAINTIFF : ADV. L. MOLATI INSTRUCTED BY A.T. MONYAKO &  
CO. ATTORNEYS**

**FOR THE DEFENDANTS : ADV. TAU FROM ATTORNEY GENERAL'S  
CHAMBERS**